

STATE OF MICHIGAN
COURT OF APPEALS

PATRICE JOHNSON,

Plaintiff-Appellant,

v

TIGA MCLOYD and TOMO MCLOYD,

Defendants-Appellee.

UNPUBLISHED

March 21, 2019

No. 341547

Washtenaw Circuit Court

LC No. 16-000640-CZ

Before: STEPHENS, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court’s judgment, following the parties’ entry into a settlement agreement, awarding defendants \$8,580.50. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff and defendants own condominiums in the same building; defendants’ unit is directly above plaintiff’s. In 2016, plaintiff filed suit against defendants, alleging that they had installed new hardwood flooring in their unit that caused noise to resonate down into her unit, disturbing her sleep and otherwise bothering her during both night and day. Plaintiff further alleged that defendants refused to rectify the problem even though she offered financial assistance. Plaintiff claimed that the installation of the hardwood flooring was in breach of the condominium master deed and bylaws; she additionally asserted counts alleging nuisance, nuisance per se, breach of quiet enjoyment, trespass, and intentional infliction of emotional distress. Defendants filed a counterclaim for abuse of process and tortious inference with a business relationship¹. The trial court dismissed defendants’ counterclaim.

In 2017, the parties participated in a mediation that resulted in a written settlement agreement (the agreement). In essence, the agreement provided for the following:

¹ Defendants had rented their unit to a tenant.

1. Carpeting would be installed with standard padding in the bedrooms of defendants' unit.

2. The hardwood flooring in the living room, main hallway, and kitchen of defendants' unit would be taken up and reinstalled with new flooring material of defendants' choosing over an unspecified sound deadening underlayment to be chosen by plaintiff.

3. Plaintiff would have "the right to supervise all of the work, either individually or through an agent(s)."

4. The parties would share the costs equally, but the total costs would not exceed \$15,000.

5. The project would be completed by August 20, 2017.

6. The agreement would be a recordable covenant that runs with the land, which would end when plaintiff permanently vacated her unit.

7. The agreement was the entire agreement between the parties, and it could not be amended except in a writing signed by all parties.

In July 2017, plaintiff moved to enforce the agreement, contending that defendants had not performed their contractual obligations. Plaintiff asserted that she had had the right to observe and inspect the project as it was being completed. Plaintiff also complained that she had not received notice of when the project would get underway and that defendants had failed to provide her with information regarding the materials being installed. At an August 2017 hearing on plaintiff's motion, the trial court directed the parties to attempt to resolve their differences. The parties held discussions off the record. Later that day, plaintiff's counsel informed the trial court that the parties had agreed that the agreement would be enforced as written. However, plaintiff's counsel also stated on the record that the parties had agreed to the following:

1. Defendants would provide plaintiff with quotes for cork underlayment and glue for use in installing the underlayment and the hardwood flooring.

2. Defendant would inform plaintiff when the work would commence.

3. Notice of when the work would commence would be provided to plaintiff's counsel in writing, which could be done via email; plaintiff's counsel could also informally indicate acceptance of that date via email.

4. With respect to plaintiff's right to inspect the work, defendants' contractor could take photographs of the work and provide them to plaintiff within three days of completion of the work.

Defense counsel stated that he did not understand how the terms of the original agreement were not modified by the new agreements, but acquiesced without further dispute or discussion on that point. Defense counsel made clear on the record that the cork and glue

installation would result in higher costs, but that defendants would agree to use those materials if the cost could be shared. Plaintiff's counsel did not object to the equal sharing of the added project costs, and agreed that the costs of the project would be shared equally. The trial court entered an order reflecting the parties' agreement.

Defendants completed the project. Plaintiff did not pay for any of the costs of the project. Defendants moved to compel plaintiff to pay one-half of the costs under the agreement. Plaintiff responded that defendants had materially breached the agreement in several ways, including by denying her the right to "supervise" the project, by refusing to give her an installation schedule, and by starting work before plaintiff approved of the start date. Plaintiff argued that she was not required to perform under the agreement (i.e., to pay her portion of the project's costs) because of defendants' material breach. The trial court granted defendants' motion and entered the judgment. The trial court subsequently denied plaintiff's motion to disqualify the trial court. Plaintiff sought review of that denial with the Chief Judge, who affirmed the trial court's denial.

This appeal followed.

II. STANDARD OF REVIEW

We review de novo questions of law regarding the existence and interpretation of a contract. *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). We review a trial court's decision to enforce a settlement agreement for an abuse of discretion. *Groulx v Carlson*, 176 Mich App 484, 493; 440 NW2d 644 (1989). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

III. ANALYSIS

Plaintiff argues that the trial court erred by entering judgment in favor of defendants, because defendants had materially breached the agreement and her payment obligation was therefore extinguished. Plaintiff also argues that her payment obligation was limited in any event to \$7,500. We disagree.

"A settlement agreement is a contract, governed by the legal rules applicable to the construction and interpretation of other contracts." *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 664; 770 NW2d 902 (2009). A valid contract requires an offer, acceptance, and mutual agreement or a meeting of the minds to all of the contract's essential terms. *Kloian*, 273 Mich App at 452-453.

Under Michigan law, "parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003). To form a contract, the acceptance must be unambiguous and in strict conformance with the offer. *Pakideh v Franklin Commercial Mtg Group, Inc*, 213 Mich App 636, 640; 540 NW2d 777 (1995). "If an offer does not require a specific form of acceptance, acceptance may be implied by the offeree's conduct." *Id.* Generally, assent to an offer may be shown by acts as well as words. *Id.* at 641.

“[C]ontracting parties are at liberty to design their own guidelines for modification or waiver of the rights and duties established by the contract[.]” *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003). A “meeting of the minds,” or mutual assent, is “judged by an objective standard, looking to the express words of the parties and their visible acts, not their subjective states of mind.” *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 548; 487 NW2d 499 (1992). A settlement agreement entered into by counsel on behalf of his client is binding on the client if counsel acted with either actual or apparent authority. See *Alar v Mercy Mem Hosp*, 208 Mich App 518, 528; 529 NW2d 318 (1995).

Well-settled principles of contract interpretation require one to first look to a contract’s plain language. If the plain language is clear, there can be only one reasonable interpretation of its meaning and, therefore, only one meaning the parties could reasonably expect to apply. If the language is ambiguous, longstanding principles of contract law require that the ambiguous provision be construed against the drafter. [*Wilkie*, 469 Mich at 60-61, quoting *Singer v American States Ins*, 245 Mich App 370, 381 n 8; 631 NW2d 34 (2001).]

A provision is ambiguous only if it irreconcilably conflicts with another provision or it is equally susceptible to more than a single meaning. *Sav-Tuk Indus v Allegan Co*, 316 Mich App 122, 136; 892 NW2d 33 (2016).

A settlement agreement is binding and enforceable if the agreement satisfies the requirements of MCR 2.507(G). *Columbia Assoc, LP v Dep’t of Treasury*, 250 Mich App 656, 668-669; 649 NW2d 760 (2002). MCR 2.507(G) provides:

An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party’s attorney.

A party to a contract may repudiate his or her contractual obligations when the other party “has committed a material breach.” *Walker & Co v Harrison*, 347 Mich 630, 635; 81 NW2d 352 (1957). However, a party’s claim that there has been a material breach justifying repudiation “is fraught with peril, for should such determination, as viewed by a later court in the calm of its contemplation, be unwarranted, the repudiator [her]self will have been guilty of material breach and [her]self have become the aggressor, not an innocent victim.” *Id.* In *Walker*, the Michigan Supreme Court explained the criteria for determining whether a breach constituted a material breach and applied the factors stated in Restatement of the Law of Contracts § 275, which provides:

In determining the materiality of a failure fully to perform a promise the following circumstances are influential:

(a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;

(b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;

(c) The extent to which the party failing to perform has already partly performed or made preparations for performance;

(d) The greater or less hardship on the party failing to perform in terminating the contract;

(e) The wilful, negligent or innocent behavior of the party failing to perform;

(f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract. [*Id.* (quotation marks and citation omitted).]

In determining whether a breach is material, “the court should consider whether the nonbreaching party obtained the benefit it reasonably expected to receive.” *Omnicom of Mich v Giannetti Inv Co*, 221 Mich App 341, 348; 561 NW2d 138 (1997). This Court reviewed the record and applied the factors articulated in *Walker* and held that they favored finding that no material breach had occurred. *Id.* at 348-349.

Plaintiff argues that defendants materially breached the agreement by preventing her from supervising the work and by refusing to let her inspect it as it was being performed. We disagree. The parties modified their agreement at the August 2017 hearing; further, even if technical breaches of the agreement occurred, they were not material.

The record establishes that defendants pulled up all of the hardwood flooring in their unit. Defendants reinstalled hardwood flooring over cork underlayment, and used glue to secure the cork underlayment and to secure the hardwood flooring as plaintiff desired. They installed carpeting over a standard pad in areas of defendants’ unit. The evidence established that the completed project complied with the terms of the agreement as modified on the record at the August 2017 hearing. In other words, defendants provided plaintiff the resolution of the noisy flooring problem that gave rise to the lawsuit in the manner that she desired. And plaintiff was allowed to choose the materials for the hardwood installation and the method of installation as had been agreed. The trial court correctly held that plaintiff received the primary substantive benefit that she expected from the settlement, and that defendants did not materially breach the agreement.

Plaintiff’s argument that defendants materially breached the agreement because she did not get to supervise all of the work during its performance and to inspect it lacks merit. First, even if plaintiff was not given opportunity to supervise the work, the work was completed to the specifications she desired. Second, the original agreement does not explicitly provide plaintiff with the right to inspect the work performed; even if the right to inspection was implied, the parties agreed at the August 2017 hearing that defendants’ contractor could take photographs of the work and provide them to plaintiff within three days of the completion of the work (which was done). Those photographs show the materials and the manner in which they were used to

install the flooring. Even if defendants technically breached the agreement by not allowing plaintiff to supervise the work as it was performed, this was not a material breach. See *Walker*, 347 Mich at 635; *Omnicom*, 221 Mich App at 348.

Plaintiff also argues that defendants materially breached the agreement by not obtaining plaintiff's counsel's written assent before starting the project. We disagree. The parties' counsel's correspondence in the record indicates that defense counsel notified plaintiff's counsel of the date the work was to commence, but that plaintiff's counsel refused to assent and attempted to unilaterally impose additional terms that were not specified in the original agreement or in the modified terms stated on the record at the August 2017 hearing (and in the trial court's subsequent order). Although defendants technically may have breached the agreement by not obtaining plaintiff's counsel's assent to the commencement of the project, we are convinced that defendants' conduct did not constitute a material breach. *Id.*

Because defendants did not materially breach the agreement, plaintiff was not relieved of her payment obligation. Therefore, the trial court did not abuse its discretion by enforcing the agreement. *Groulx*, 176 Mich App at 493.

Plaintiff also argues that her payment obligation was limited to \$7,500. We disagree. The original agreement specified a \$15,000 cap to the costs of the project, with costs to be shared equally. Later, however, plaintiff demanded that defendants use glue, rather than staples or nails, to affix the cork underlayment. At the August 2017 hearing, defendants agreed to install the cork underlayment with glue, but stated in open court that they did so on the condition that the anticipated additional cost would be shared equally with plaintiff. Plaintiff's counsel agreed to the use of glue and cork underlayment even after hearing that it would add to the cost of the project, as long as the costs were shared equally. The contractor's invoice provided to the trial court by defendant indicated that the use of glue instead of nails or staples increased the project cost by over \$5000. A contract term may be deemed abandoned by the acts and conduct of the parties and an abandoned term is not subject to specific enforcement. *Higbie v Higbie*, 306 Mich 577, 599; 11 NW2d 248 (1943). Plaintiff's request for the use of specific materials with awareness of the increased cost rendered abandoned the \$15,000 cost limit in the original agreement, and the trial court accordingly did not abuse its discretion by entering judgment in an amount in excess of \$7,500.

Affirmed. As the prevailing party, defendants may tax costs. MCR 7.219(A).

/s/ Cynthia Diane Stephens
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra